



GARY R. HERBERT
Governor

GREGORY S. BELL
Lieutenant Governor

State of Utah

DEPARTMENT OF NATURAL RESOURCES

MICHAEL R. STYLER
Executive Director

Division of Oil, Gas and Mining

JOHN R. BAZA
Division Director

January 30, 2013
Fed Ex #794641779436

Outgoing
00150032
OK
cc: Steve C
Daron

Kenneth Walker, Chief
Office of Surface Mining
Denver Field Office
1999 Broadway, Suite 3320
Denver, CO 80202

SUBJECT: Ten Day Notice #X12-140-933-001 Crandal Canyon Mine

Dear Mr. Walker:

On December 7, 2012, your office issued Ten Day Notice #X12-140-933-001 (the "TDN") to the Utah Division of Oil, Gas and Mining (the "Division"). The TDN declares that the Division is in violation of Utah Admin. Code R645-301-830.200 for the Crandall Canyon Mine (the "Mine") because the Division has "[f]ail[ed] to secure [a] bond sufficient to assure completion of the reclamation plan if the Division must perform the work in the event of forfeiture[.]" This letter serves as the State's response to the TDN, as required by 30 C.F.R. § 842.11.

Under 30 C.F.R. § 842.11(b)(1)(ii)(B)(2), "an action or response by a State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the state program shall be considered 'appropriate action' to cause a violation to be corrected or 'good cause' for failure to do so." "Appropriate action" is defined as "enforcement or other action authorized under the State program to cause the violation to be corrected,"¹ while "good cause" includes the following five categories:

- (i) Under the State program, the possible violation does not exist;
- (ii) The State regulatory authority requires a reasonable and specified additional time to determine whether a violation of the State program does exist;
- (iii) The State regulatory authority lacks jurisdiction under the State program over the possible violation or operation;
- (iv) The State regulatory authority is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, where that order is based on the violation not existing or where the temporary relief standards of section 525(c) or 526(c) of the Act have been met; or
- (v) With regard to abandoned sites as defined in § 840.11(g) of this chapter, the State regulatory authority is diligently pursuing or has exhausted all appropriate enforcement provisions of the State program.²

For the reasons set forth in greater detail below, the State responds that it (I) qualifies for "good cause" under subsections (i) and (iv) above, and (II) has taken "appropriate action" to address the water treatment bonding issue.

¹ 30 C.F.R. § 842.11(b)(1)(ii)(B)(3).

² *Id.* at § 842.11(b)(1)(ii)(B)(4).



Before discussing the State's position, it is important to highlight the definition of "arbitrary and capricious." According to the OSM Directive on TDNs, a state regulatory authority's ("RA") response to a TDN is "arbitrary, capricious, or an abuse of discretion" only if the RA acts:

- (1) Irrationally in that the RA's interpretation of its program is inconsistent with the terms of the approved program or any prior RA interpretation recognized by the Secretary of the Interior (Secretary);
- (2) Without adhering to correct procedures;
- (3) Inconsistent with applicable law; or
- (4) Without a rational basis after proper evaluation of relevant criteria.³

The OSM Directive further explains that in making the determination of whether a RA's response is "arbitrary, capricious, or an abuse of discretion," the OSM "*will not substitute its judgment for that of the RA*," and "will make a finding of appropriate action or good cause if the RA presents a rational basis for its decision, *even if OSM might have decided differently had it been the RA*."⁴ Thus, "OSMRE will recognize a state's interpretation of its own program as long as it is not inconsistent with the terms of the program approval or any prior state interpretation recognized by the Secretary"⁵

I. THE STATE HAS "GOOD CAUSE" FOR NOT TAKING ACTION IN RESPONSE TO THE TDN

There are two reasons the State has "good cause" for not taking additional action in response to the TDN: (A) Under the Utah Coal Program, the alleged violation does not exist,⁶ and (B) the Division is precluded by the March 6, 2012 Board Order (the "Order" or "Board Order") and January 28, 2013 Memorandum Decision and Order (the "January Order") from acting on the possible violation.⁷

A. Under the Utah Coal Program, a Violation Does Not Exist.

The State has "good cause" for not taking additional action in response to a TDN if, "[u]nder the State program, the possible violation does not exist[.]"⁸ "Here, OSM will defer to the state's decision that no violation exists unless OSM determines that the state conclusion is arbitrary, capricious, or an abuse of discretion."⁹

The violation asserted by OSM is the Division's "[f]ailure to secure bond sufficient to assure completion of the reclamation plan"¹⁰ However, under the state

³ OSM Directive—Ten Day Notices, Subject No. INE-35, January 31, 2011, at 2, ¶ 3.b., available at <http://www.osmre.gov/guidance/docs/directive968.pdf>.

⁴ *Id.* at ¶ 4.d (emphasis added); see also *Elk Run Coal Co. v. Babbitt*, 919 F.Supp. 225, 230 (S.D. W.Va. 1996) (noting preface to 30 C.F.R. § 842.11 states: "Implementation of the goal of state primacy requires that OSMRE defer to a state's interpretation of its own regulations").

⁵ Preamble to 30 C.F.R. § 842.11, 53 Fed.Reg. 26728-01, 26,732 (1988), 1988 WL 278570 (F.R.); see also *National Coal Ass'n v. Uram*, Nos. 87-2076, 88-2273, 88-2416, 1994 WL 736422, at *13 (D.D.C. Sept. 16, 1994) (citing Preamble).

⁶ See 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i).

⁷ See 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv).

⁸ 30 C.F.R. § 842.11(b)(ii)(B)(4)(i).

⁹ *National Coal*, 1994 WL 736422 at *13.

¹⁰ See TDN.

program, this alleged violation does not exist because the State has secured a \$720,000 non-diminishing, rolling-forward bond from the operator of the Mine (Genwal).

OSM may believe that this bond structure is insufficient. However, the question is not whether OSM believes that the bond amount should be higher.¹¹ Instead, the question is whether the State's conclusion that there is a sufficient bond was arbitrary and capricious.¹²

The State's action is not arbitrary or capricious because it is grounded in the evidence presented to the Board. The iron level data compiled by Genwal and Division personnel shows that iron levels in the Mine water discharge are decreasing. The existing bond is based upon this evidence. Additionally, as discussed more fully below, the State will review the ongoing monitoring data every six months for the purpose of assessing any necessary adjustment of the bond amount and structure. The State's active role in monitoring and oversight is exactly the type of authority and control a primacy state should have under SMCRA.

Thus, because there is a rational basis for the conclusion that no violation exists, there is "good cause" for not taking any additional action in response to the TDN.

B. The Division is Precluded by the Board Order from Acting on the Possible Violation.

The State also has "good cause" for not taking any additional action in response to the TDN because the Division "is precluded by an administrative or judicial order from an administrative body or court of competent jurisdiction from acting on the possible violation, [and] that order is based on the violation not existing[.]"¹³ The Board Order precludes the Division from taking any further action in this case because under the terms of the Board's Order, there is no existing violation.

At the outset, it is important to note that the ultimate responsibility for interpretation and application of the Act lies with the Board.¹⁴ Pursuant to this authority, the Board required a non-diminishing \$720,000 bond with ongoing monitoring and bond reassessment, which was based on a thorough review of the evidence during a multi-day hearing. This decision was not "arbitrary, capricious, or an abuse of discretion" because it was founded upon a proper basis and because the Board was acting within the scope of its authority.¹⁵ That is, the decision was a rational and consistent interpretation of the Utah Coal Program and it adhered to correct procedures.¹⁶

¹¹ "The OSM does not have authority to conduct a *de novo* review of state adjudications." *Al Hamilton Contracting Co. v. Kempthorne*, 639 F.Supp.2d 597, 607 (W.D. Pa. 2009).

¹² 30 C.F.R. § 842.11(b)(1)(ii)(B)(2).

¹³ 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(iv).

¹⁴ Utah Code Ann. §§ 40-6-4(1), 40-10-14(3), and 40-10-22(3).

¹⁵ *Pittsburg & Midway Coal Mining Co. v. Office of Surface Mining Reclamation and Enforcement*, 132 IBLA 59, sets forth the "applicable standard of review to be applied by OSM in determining whether a decision or an order of a state administrative body that a violation does not exist is good cause for failure to correct a violation." *Id.* at *80-81. That standard "is the arbitrary, capricious, or abuse of discretion standard, the same standard applicable to OSM review of state regulatory authority actions or responses. Thus, OSM is required to defer to the ruling of the state administrative body that no violation exists, unless it determines that the ruling is arbitrary, capricious, or an abuse of discretion of the state program. Such a ruling would be arbitrary and capricious if it did not have a proper basis, and it would be an abuse of discretion if the administrative body were acting outside the scope of its authority under the state program in making such a ruling." *Id.* at 81.

¹⁶ See OSM Directive—Ten Day Notices, Subject No. INE-35, January 31, 2011, at 2, ¶ 3.b.

First, the Order has a proper basis. After a lengthy evidentiary hearing and extensive review of the expert reports submitted by the Division and Genwal, the Board concluded that a non-diminishing \$720,000 bond was a sufficient amount to assure completion of the reclamation plan for the Mine if the Division had to perform the work.¹⁷ The Board accepted the parties' stipulation that annual water treatment costs at the Mine were \$240,000 and found that the "elevated iron concentrations at issue will not likely persist beyond the next three years."¹⁸ Further, the Board retained jurisdiction to "review the water monitoring data annually or with such greater frequency as the Division deems appropriate" for the express purpose of adjusting the bond if necessary.¹⁹ This monitoring and bond adjustment program has been further defined in the January Order, with reporting of monitoring data to occur at six month intervals for the purpose of reassessing the bond amount and structure.²⁰

OSM may feel that the Board Order is incorrectly decided. However, the question is not whether OSM would have decided the matter differently had it been the initial arbiter;²¹ rather, the question is whether the Board had a proper and rational basis for deciding the way it did.²² The Board used its expertise and its unique position as the trier of fact to decide what amount was sufficient to assure completion of the reclamation plan. After weighing the expert testimony and all other evidence in the record, the Board rendered its decision. Thus, there is a proper basis for the Order.

Second, the Order is not an abuse of discretion. An abuse of discretion occurs if the administrative body acts outside the scope of its authority under the state program in making such a ruling.²³ Here, the Board had authority to issue the Order. The approved Utah Coal Program entrusts to the Board and the Division dual responsibility to "establish specific reclamation and enforcement standards for new and existing coal mining operations" and to "condition the issuance of a permit to commence or continue surface mining operations upon the posting of performance bonds, deposits, or sureties . . ."²⁴ Because the Division's actions in this matter were appealed to the Board, the Board's jurisdiction was triggered. Thus, the Board did not act outside the scope of its authority in issuing the Order.

Recognizing that the Division is precluded from acting by the Board Order, OSM argues that the Order is not decided "on the basis that the violation does not exist. To the contrary, the Board found that a violation of R645-301-830.200 does exist."²⁵ However, OSM does not explain how it comes to the conclusion that the Board determined that the \$720,000 bond was a violation of R645-301-830.200. In fact, OSM cites no part of the Order to support its

¹⁷ Order at 29, ¶ 78. In the TDN, OSM alleges that it is not possible to make a finding concerning the duration of the elevated iron discharge at issue "with any scientific certainty." Cover Letter to TDN, December 7, 2012. The Board considered the technical exhibits, testimony and other evidence presented at the hearing and made its finding based upon the weight of the evidence presented. The State asserts that the Board's weighing of the evidence and making findings was reasonable, proper, and had a rational basis, and is concerned that OSM's TDN may be based in part upon the application of an unspecified and more stringent standard of certainty than is mandated by the applicable statutes and regulations.

¹⁸ Order at 30, ¶ 2.

¹⁹ Order at 30, ¶ 3.

²⁰ January Order at 5-6.

²¹ "The OSM does not have authority to conduct a *de novo* review of state adjudications." *Al Hamilton Contracting Co. v. Kempthorne*, 639 F.Supp.2d 597, 607 (W.D. Pa. 2009).

²² 30 C.F.R. § 842.11(b)(1)(ii)(B)(2).

²³ See *Pittsburg & Midway*, 132 IBLA 59 at *80-81.

²⁴ Utah Code Ann. §§ 40-10-6(3) & -6(7).

²⁵ TDN Cover Letter, at 2.

contention. By contrast, the Order shows the opposite of OSM's assertion, holding that "[t]his determination of a specified bond amount complies with the requirements of Utah Code Ann. § 40-10-15(1) and Utah Admin. Code. R645-301-830."²⁶ Furthermore, the \$720,000 bond amount has been posted by Genwal according to the requirements of the Utah Coal Program and Genwal is in compliance. Thus, under the terms of the Orders, there is no existing violation. The requirements of 30 C.F.R. § 842.11(b)(ii)(B)(4)(iv) are met and the Division has "good cause" not to take any additional action in response to the TDN.

II. THE STATE HAS TAKEN "APPROPRIATE ACTION" TO ADDRESS THE WATER TREATMENT BONDING ISSUE

The Federal regulations define "appropriate action" to mean "enforcement or other action authorized under the State program to cause the violation to be corrected."²⁷ The State's continuing actions in response to the elevated iron concentrations and the associated bond calculation constitute appropriate action under the circumstances.

First, the State notes that the Board's Order provides for ongoing water monitoring and the ability to adjust the bond amount in a similar fashion to the previously OSM-approved amended Division Order 10A. OSM based the Action Plan upon DO10A as amended on June 20, 2012. Amended DO10A did not require an initial deposit sufficient to cover water treatment in perpetuity, but rather allowed for an initial deposit of five (5) years of treatment costs and subsequent bond increases (beginning after three years) as water monitoring demonstrated necessary. While the Board's Order required a deposit of three (3) years of water treatment costs based upon findings made after the evidentiary hearing, it also made provision for future bond adjustment based upon continuous water monitoring.²⁸ The Board further articulated this provision in its January Order and called for increased frequency of updated data submissions.²⁹ OSM should therefore find the State's actions to be appropriate action for the same reasons OSM approved of Amended DO10A and the corresponding Action Plan.

The State further notes that in connection with this matter, the Board initiated a process to analyze rule changes (and statutory changes if necessary) to provide for additional bonding instruments (including trust funds and annuities) better suited to long-term water treatment situations than any bonding instruments presently provided for in the approved Utah program. Although under the terms of the Board Order there is no present bond sufficiency violation given the operator's \$720,000 deposit, the Board, as noted above, provided for potential bond adjustment based upon ongoing water monitoring. The Board also expressly stated that the new bonding regulations Utah is analyzing may be applied in this case once those

²⁶ Order at 29, ¶ 78 (emphasis added).

²⁷ 30 C.F.R. § 842.11(b)(1)(ii)(B)(3).

²⁸ Order at 30, ¶ 3. Although the State's plan to make future bond increases in response to monitoring data does not include predetermined increases at set intervals as did Amended DO10A, the State feels that the existing program of six-month updates and bonding analysis is as effective as Amended DO10A, and under some circumstances may be more effective. Under the approach the State has settled upon, bond increases can occur sooner than the three year timeframe contemplated in Amended DO10A, and such increases can take any form and be of any size based upon what the evidence warrants as opposed to being limited to an increase of one year's worth of treatment costs as spelled out in Amended DO10A.

²⁹ See January 28, 2013 Order at 4-6. OSM, in the Updated Problem Description discussion of the Action Plan, recognized the importance of evaluating the ongoing monitoring data of the discharge water to determine the amount of the bond. This is exactly what the Board's January Order does. It takes into consideration the latest monitoring data and, as discussed above, provides for future bond adjustment, if necessary, based on the data.

regulations are in place depending upon what the water monitoring shows.³⁰ This rulemaking effort is presently underway.

For the reasons stated above, the State's actions in this matter, and its ongoing water monitoring and plan to increase the bond based upon what future water monitoring shows, satisfy the appropriate action requirements in § 842.11.

The Division recognizes that OSM has a difficult task in ensuring compliance with SMCRA. The Division is open to any suggestion beyond the rulemaking discussed above that OSM may have with regard to possible changes in the Utah Coal Program, but the Division does not believe that it is failing to enforce its approved program by requiring Genwal to post a \$720,000 bond and constantly monitoring the Mine. Rather, the Division believes that it is actively enforcing the provisions of the Coal Program as required by OSM and SMCRA, and appreciates the great responsibility it has in running an effective and efficient coal program.

Sincerely,



for John R. Baza, Director
Division of Oil, Gas and Mining

JRB:ear/msj
Enclosure (1)

cc: Dana Dean, DOGM by email
Jim Jensen, Chair BOGM by email
Mike Johnson, AAG by email
Kassidy Wallin, AAG by email
Daron Haddock, DOGM by email
Jeff Fleichman, OSM by email

³⁰ Order at 9, n. 2 and January 28, 2013 Order at 6.

BEFORE THE BOARD OF OIL, GAS & MINING

DEPARTMENT OF NATURAL RESOURCES

STATE OF UTAH

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FILED

JAN 28 2013

**SECRETARY, BOARD OF
OIL, GAS & MINING**

**IN THE MATTER OF THE REQUEST
FOR AGENCY ACTION OF GENWAL
RESOURCES, INC., PETITIONER AND
PERMITTEE; DIVISION OF OIL, GAS &
MINING, RESPONDENT – REQUEST
FOR BOARD REVIEW OF DIVISION
ORDER DO10A, REQUIRING BONDING
FOR THE PERPETUAL TREATMENT
OF MINE WATER DISCHARGE AT THE
CRANDAL CANYON MINE IN EMERY
COUNTY, UTAH.**

**MEMORANDUM DECISION AND
ORDER**

Docket No.: 2010-026

Cause No.: C/015/0032

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This matter originally came before the Board of Oil, Gas and Mining (the "Board") on the Request for Hearing and Petition for Review of Division Order DO10A ("Petition") filed by Genwal Resources, Inc. ("Petitioner" or "Genwal"). The Petition sought review of the decision of the Division of Oil, Gas & Mining ("Division") in issuing Division Order DO10A ("DO") pertaining to polluted water discharge from the Crandall Canyon Mine in Emery County, Utah. The Board held hearings in this matter on October 27, 2010, January 26, 2011, May 25, 2011, October 26, 2011, and December 7, 2011. On March 6, 2012 the following members of the Board voted unanimously on the Board's Findings of Fact, Conclusions of Law and Order ("March Order"): James T. Jensen, Chairman, Jake Y. Harouny, Jean Semborski, Ruland J. Gill, Jr. and Kelly L. Payne. In the March Order the Board vacated the perpetual income stream bonding requirements of Paragraph III in the DO and found that the posting of an additional \$720,000 bond that would roll forward from year to year until compliance was obtained would

provide sufficient bond coverage under the applicable regulations. The Board ordered that \$720,000 be posted and maintained until the iron levels fell below applicable UPDES discharge limits for a period of at least six months, or such other period of time as the Board, based on evidence submitted by either the Division or Genwal, may find is sufficient to indicate that treatment is no longer required. The Board also ordered the Division to review the water monitoring data annually, or with such greater frequency as the Division deems appropriate, and requested that the parties petition the Board for bond adjustment should the water monitoring data demonstrate a need. Following issuance of the March Order, Genwal posted the required \$720,000 bond and is in compliance with the applicable bonding regulations.

After Genwal posted the \$720,000 bond, the Office of Surface Mining, Reclamation and Enforcement ("OSM") requested an update on the Crandall Canyon Mine water quality from the Division. On August 24, 2012 the Division responded to OSM by providing updated water monitoring data. In this update, the Division stated that its statistical analysis of the data from July 2011 to June 2012 showed a stable trend in iron levels, in contrast to a previously-observed downward trend from January 2010 to March 2011. Given that this monitoring data update and analysis had been provided to OSM, and in light of the Board's request for such monitoring data in the March Order, the Board requested that the parties provide an update to the Board regarding the latest monitoring data at the Board's January 23, 2013 meeting.

This Cause came on for hearing before the Board on Wednesday, January 23, 2013 at approximately 9:30 a.m., in the Auditorium of the Utah Department of Natural Resources Building in Salt Lake City, Utah. The following Board members were present and participated at the hearing: Chairman James T. Jensen, Ruland J. Gill, Jr., Jean Semborski, Jake Y. Harouny, Kelly L. Payne, Chris D. Hansen and Carl F. Kendel. The Board was represented by Michael S.

Johnson and Cameron B. Johnson, Assistant Attorneys General.

Denise A. Dragoo and James P. Allen appeared as counsel for Petitioner Genwal Resources, Inc., Steven F. Alder and Kassidy J. Wallin, Assistant Attorneys General, appeared on behalf of Respondent the Utah Division of Oil, Gas and Mining.

At the hearing, Mr. Erik Petersen testified as an expert in hydrology on behalf of the Petitioner. Mr. Petersen testified that based upon his statistical analysis of monitoring data through December of 2012, the iron levels in the discharge water were declining and will likely fall below the UPDES standard of 1.24mg/L at some point in 2014. Mr. Peterson's review of the new data therefore did not alter his opinion concerning the duration of the elevated iron concentrations as set forth in his reports and testimony prior to the March Order.

Testifying on behalf of the Division was Kenneth M. Hoffman. Based upon his engineering background, Mr. Hoffman was offered and recognized as an expert in environmental engineering and water sampling. Mr. Hoffman was not offered by the Division or recognized by the Board as an expert in matters pertaining to coal mine hydrology or geochemistry, as was Mr. Peterson. Mr. Hoffman's testimony explained his analysis of the water monitoring data taken at the Crandall Canyon Mine since the Board's December 2011 hearing. Mr. Hoffman stated that although statistical analysis of the data available at the time of the Division's August 24, 2012 update to OSM indicated the subject iron levels had settled into a stable trend, the same statistical analysis incorporating the more recent data indicate that the subject iron levels are in fact trending downward. This conclusion is based on Mr. Hoffman's use of a Mann-Kendall trend analysis, which is employed to discern increasing and decreasing trends within the applicable data sets. Mr. Hoffman characterized the Mann-Kendall analysis as the "standard

environmental data statistical analysis.” When asked whether iron levels in the water that are above the UPDES standard will be perpetual, he responded that “the best scientific hypothesis points towards decreasing levels.”

NOW THEREFORE, the Board, having fully considered the testimony presented and the exhibits received into evidence at the hearing, being fully advised, and for good cause, hereby makes and enters this Memorandum Decision and Order concerning its review of the newly submitted water monitoring data.

The Board finds that the evidence received and testimony heard at the January hearing concerning the recent water monitoring data provide further support for the March Order’s finding concerning the duration of elevated iron levels and the related ruling regarding the sufficiency of the \$720,000 rolling-forward bond. The data presented to the Board confirms the declining trend in the elevated iron levels demonstrated by the evidence reviewed prior to the March Order. The evidence presented indicates that iron levels in the untreated discharge from the Crandall Canyon Mine above the UPDES discharge limit of 1.24 mg/L will not be perpetual. Based upon the evidence presented, it is reasonable to conclude that the iron concentration in the discharge will fall below and remain under 1.24 mg/L before March, 2015 (three years from the date of the Board’s March Order). Therefore, the Board finds that the current bond amount and rolling-forward structure are sufficient to assure the completion of the reclamation plan if the work has to be performed by the Division as required by the applicable regulations. To build in added assurance of bond sufficiency for the subject water discharge issue, the Board in its March Order intentionally crafted two provisions. First, the \$720,000 three year treatment cost bond amount rolls forward undiminished each year, meaning as long as it is reasonably expected that the iron concentrations will meet discharge limits within three years of any reevaluation of the

data subsequent to the March Order, the current bond amount and structure are sufficient.

Second, recognizing the inherent variability of water monitoring data, the Board indicated that any request for bond release is to be premised on at least six months of compliant iron levels. The Board was careful not to order that the bond requirement terminate automatically after six months of compliant discharge, rather that this would be the earliest time for evaluation of the likelihood that iron levels would remain at compliant levels and consideration of possible bond reduction or release.¹

As noted in the March Order, the Board maintains continuing jurisdiction in this matter and will actively review the monitoring data to assess whether bond adjustment is necessary. The Board asks the parties to provide monitoring data updates each six (6) months, the first of which is to be filed with the Board thirty (30) days prior to the Board's regularly-scheduled July 2013 Board hearing, with updates being filed by the same deadline prior to each of the Board's regularly-scheduled January and July Board hearings thereafter. If iron concentrations remain above applicable limits and the monitoring data indicate a flattening trend (or a downward trend which necessitates a longer than three year period of water treatment), the Board will analyze at that time, based upon that evidence, what kind of bond increase and duration structure is

¹ The Board notes that in the regression analysis presented by Mr. Peterson, the plotted 95% confidence interval line around the observed data would intersect the 1.24 mg/L threshold at a later date than the 95% confidence interval line plotted around the mean of the data. Several factors persuade the Board that the existing amount of bond is sufficient even accounting for this fact. First, the evidence adduced at the hearing revealed that there are sampling error issues that have introduced undue noise into the data which have contributed to a wider gap between the mean and the upper confidence interval than may exist. The Board expects that the July 2013 data update, which will reflect a longer period of data collection from the new sampling port, will lead to a better evaluation of this issue. Additionally, as noted above, because the \$720,000 bond is rolling, the State of Utah presently holds sufficient bond for water treatment through January of 2016.

appropriate. If future monitoring data reviewed by the Board not only extends the period of necessary treatment but indicates stabilizing levels of total iron above the applicable discharge limits, the Board will analyze at that time a bond increase, or a series of bond increases, to an amount and duration structure that will provide for long-term treatment. This may include application of the new long-term pollutional discharge bonding rules presently being developed by the state program if such regulations are in place at that time.

The Board has considered and decided this matter as a formal adjudication, pursuant to the Utah Administrative Procedures Act, Utah Code Ann. §§ 63G-4-204 through 208, and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, Utah Admin. Code R641.

This Memorandum Decision and Order ("Order") is based exclusively upon evidence of record in this proceeding or on facts officially noted, as weighed and analyzed by the Board in the exercise of its expertise as set forth in Utah Code Ann. §40-6-4(2)(a) through (e). This Order constitutes the signed written order stating the Board's decision and the reasons for the decision, as required by the Utah Administrative Procedures Act, Utah Code Ann. § 63G-4-208, and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, Utah Admin. Code R641-109; and constitutes a final agency action as defined in the Utah Administrative Procedures Act and Board rules.

Notice of Right of Judicial Review by the Supreme Court of the State of Utah. As required by Utah Code Ann. §63G-4-208(1), the Board notifies all parties to this proceeding that they have the right to seek judicial review of this Order by filing an appeal with the Supreme

Court of the State of Utah within 30 days after the date this Order is entered. Utah Code Ann. §63G-4-401(3)(a) and 403.

Notice of Right to Petition for Reconsideration. As an alternative, but not as a prerequisite to judicial review, the Board notifies all parties to this proceeding that they may apply for reconsideration of this Order. Utah Code Ann. § 63G-4-302, entitled "Agency Review – Reconsideration," states:

(1) (a) Within 20 days after the date that an order is issued for which review by the agency or by a superior agency under Section 63G-4-301 is unavailable, and if the order would otherwise constitute final agency action, any party may file a written request for reconsideration with the agency, stating the specific grounds upon which relief is requested.

(b) Unless otherwise provided by statute, the filing of the request is not a prerequisite for seeking judicial review of the order.

(2) The request for reconsideration shall be filed with the agency and one copy shall be sent by mail to each party by the person making the request.

(3)(a) The agency head, or a person designated for that purpose, shall issue a written order granting the request or denying the request.

(b) If the agency head or the person designated for that purpose does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Id.

The Rules of Practice and Procedure before the Board of Oil, Gas and Mining entitled "Rehearing and Modification of Existing Orders" state:

Any person affected by a final order or decision of the Board may file a petition for rehearing. Unless otherwise provided, a petition for rehearing must be filed no later than the 10th day of the month following the date of signing of the final order or decision for which the rehearing is sought. A copy of such petition will be served on each other party to the proceeding no later than the 15th day of that month.

Utah Admin. Code R641-110-100.

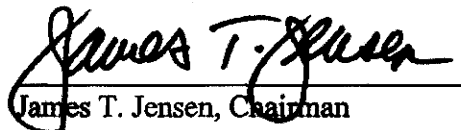
See Utah Administrative Code R641-110-200 for the required contents of a petition for rehearing. The Board rules that should there be any conflict between the deadlines provided in the Utah Administrative Procedures Act and the Rules of Practice and Procedure before the Board of Oil, Gas and Mining, the later of the two deadlines shall be available to any party moving to rehear this matter. If the Board later denies a timely petition for rehearing, the aggrieved party may seek judicial review of the order by perfecting an appeal with the Utah Supreme Court within 30 days thereafter.

The Board retains exclusive and continuing jurisdiction of all matters covered by this Order and of all parties affected thereby; and specifically, the Board retains and reserves exclusive and continuing jurisdiction to make further orders as appropriate and authorized by statute and applicable regulations.

The Chairman's signature on a facsimile copy of this Order shall be deemed the equivalent of a signed original for all purposes.

ISSUED this 28th day of January, 2013.

UTAH BOARD OF OIL, GAS & MINING


James T. Jensen, Chairman

CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing **MEMORANDUM DECISION AND ORDER** for Docket No. 2010-026, Cause No. C/015/0032F to be mailed with postage prepaid, this 29th day of January, 2013, to the following:

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A handwritten signature in blue ink that reads "Julie Ann Carter". The signature is written in a cursive style and is positioned above a horizontal line.